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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 407

BEN HERBERT PHELPER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

CHARLES W. TESSMER,
706 Main Street, Suite 400,
Dallas, Texas 75202,

EMMETT COLVIN, JR.,
706 Main Street, Suite 400,
Dallas, Texas 75202,

Counsel for Petitioner.

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INDEX

	Page
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement of the Facts	3-6
Reasons for Granting the Writ	6-12
Conclusion	12
Certificate of Service	14
Appendix A — Statutes	15-16
Appendix B — Opinions	17-23

Page

Cases

Amos v. United States, 255 U.S. 313 9
Badillo v. Superior Ct., 46 Cal. 2d 269 8
Cameron v. Texas, 346 S.W. 2d 845 9
Channel v. United States, 285 F. 2d 217 9
Collins v. Beto, June 18, 1965, ... F. 2d .... (5th Cir.) 7
Hall v. Warden, 315 F. 2d 483 8
Heflin v. Texas, 274 S.W. 2d 681 10
Higgins v. United States, 209 F. 2d 819 ..... 9, 10
Jackson v. Denno, 278 U.S. 368 10
Johnson v. Zerbst, 304 U.S. 458 8
Judd v. United States, 190 F. 2d 649 9
Ker v. California, 374 U.S. 23 7
Mapp v. Ohio, 367 U.S. 343 7
Pekar v. United States, 315 F. 2d 319 8
United States v. Smith, 308 F. 2d 657, 663 8
United States v. Vilae, 312 F. 2d 595 8
Villano v. United States, 310 F. 2d 680 8
Wong Sun v. United States, 371 U.S. 471 7

Statutes

Texas Penal Code, Article 527 3
Section 2 12
28 U.S.C., Section 1257(3) 2

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BEN HERBERT PHELPER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in Cause No. 37,771, styled Ben Herbert Phelper, Appellant v. State of Texas, Appellee, on March 10, 1965, Motion For Rehearing being denied on April 14, 1965, a copy of said opinion having been heretofore attached to Petitioner's Application for Stay of Mandate which exhibit thereto is made a part hereof by reference for all pertinent purposes.

The Honorable Hugo L. Black has heretofore granted Petitioner an Order extending the time to file Petition for Writ of Certiorari to August 2, 1965.

JURISDICTION

The jurisdiction of this Court to review the case on Petition for Writ of Certiorari rests upon 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether or not Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the fruits of a search based upon a written consent executed by Petitioner after arrest and during continuing custody?

   (a) Was Petitioner entitled to have the question of the illegality of his arrest determined by the Texas Courts in order thereby to determine whether the fruits of such arrest, including the written consent, was tainted by the illegality of arrest?

   (b) Did the State of Texas sustain the burden of proving that the written consent to search Petitioner's home was free and voluntary?

      (1) Did the testimony of the arresting officer comport with common sense and human experience according to Federal standards?

2. Whether or not Petitioner was denied his constitutional rights under the Fourteenth Amendment to the Constitution

of the United States by the failure of the Trial Court to make an independent finding on the issue as to whether or not Petitioner voluntarily consented to the search of his home from whence the product was found upon which his conviction was based?

3. Whether or not the conviction was so lacking in evidentiary support as to constitute a violation of Petitioner's due process rights under the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED

A statutory provision involved is Article 527 of the Penal Code of Texas, which statute is printed in Appendix B.

STATEMENT OF THE FACTS

Petitioner was convicted under Article 527 of the Texas Penal Code for unlawfully and knowingly having in his possession obscene pictures, his punishment being assessed at a fine of One Thousand Dollars ($1,000.00). This conviction was affirmed by the Court of Criminal Appeals of Texas by written opinion on March 10, 1965, Motion for Rehearing being denied on April 14, 1965, without written opinion. On April 22, 1965, Petitioner presented an Application for Writ of Habeas Corpus, which Application was denied on said date without written opinion. On said date Petitioner moved for a Stay of the Mandate pending a granting of the Stay by this Court, the Mandate being Stayed by the Texas Appellate Court until May 22, 1965. Thereafter, this Court on May

10, 1965, entered its Order Staying the Mandate and extending the time for filing this Petition until August 2, 1965.

The evidence developed at the trial of this cause is summarized in the opinion by the Texas Court of Criminal Appeals as follows:

> "The State's evidence shows that appellant [Petitioner] lived with his wife and step-son in the City of Richardson. In the early part of November, 1963, when the witness James Bartley was in the home delivering milk, appellant [Petitioner] showed him some pictures of nude women. Subsequent to seeing the pictures, Bartley had a conversation with Detective Bob Smith of the Richardson Police Department. On November 7th, Detective Smith who had some experience in photography met with the appellant [Petitioner] in a drug store, and the two became engaged in conversation relative to photography. In the conversation, appellant [Petitioner] told the detective that he took pictures and requested him to come to appellant's [Petitioner's] home and see his photographs so that he could recommend a place where he might sell or distribute them. The following day, Detective Smith went to the home where appellant [Petitioner] showed him between one and two hundred pictures which were colored slides of different girls. Of the pictures exhibited only one appeared to be obscene, it being a photograph of a woman with her pubic hair exposed. On such occasion, appellant [Petitioner] emphasized that he was interested in selling the pictures and thought the detective could use some of his contacts in helping him sell them.
>
> "After leaving appellant's [Petitioner's] home, Detective Smith had a meeting with his Chief of Police, and Postal Inspector R. H. Robinson was later called. In a meeting on November 12th with the Inspector, a buyer for appellant's photographs was set up under the

name of Garrett who was to correspond with appellant [Petitioner] relative to the pictures. On December 5th, Detective Smith returned to appellant's [Petitioner's] home, and appellant [Petitioner] showed him some "series" pictures of the same girl in sequence of undressing. At that time appellant [Petitioner] stated he was mailing the pictures to a man by the name of Garrett with whom he had had correspondence. On December 13th, Detective Smith again met appellant [Petitioner] in the drug store, and appellant [Petitioner] informed him that he was sending some more pictures to Garrett.

"The State's proof further shows that on January 22nd Detective Smith again saw appellant [Petitioner] in the drug store and introduced him to Postal Inspector Harry D. Holmes. After they had discussed going for some coffee, the three went outside to where Postal Inspector Robinson and Detective Burleson were seated in an automobile. They then got in the car, and the five proceeded to drive to the police station. On the way to the station, Robinson and Holmes identified themselves as postal inspectors and told appellant [Petitioner] they wanted to talk to him about the pictures. After arriving at the police station, appellant [Petitioner] proceeded to sign and execute a written consent to the search of his home by Inspector Holmes without a search warrant. Appellant [Petitioner] then accompanied Inspectors Robinson and Holmes and Officers Smith, Burleson and Robbins to his home where a search was made. In the search, the officers found sixteen polaroid pictures on a bed and numerous other pictures in a night stand which were photographs of men and women in the nude. Some of the pictures showed the parties engaged in the act of sexual intercourse and other unnatural sex acts.

"Testifying in his own behalf, appellant [Petitioner] stated that the reason he consented to the search of his home was because of threats of the officers and the rep-

resentations made to him that they had a search warrant. He further swore that he did not sign the written consent for the search until after the search had been completed, and they had returned to the police station. Appellant [Petitioner] admitted possessing the photographs found by the officers in his home but stated that he took the pictures upon the encouragement and inducement of Detective Smith and a letter he had received from Garrett.

"Appellant's testimony with reference to his reason for executing the written consent to search was sharply disputed by the officers as well as his claim that he was induced to take the pictures by them. Detective Smith testified that while he did have in his possession a search warrant for appellant's [Petitioner's] house he did not advise appellant [Petitioner] of the warrant until after he had signed the written consent to search. He swore that appellant [Petitioner] signed the consent before the search was made. He also denied having induced appellant [Petitioner] to take and possess the photographs found as a result of the search."

REASONS FOR GRANTING THE WRIT

1. Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the fruits of a search based upon a written consent executed by Petitioner after arrest and during continuing custody.

(a) Petitioner was entitled to have the question of the illegality of his arrest determined by the Texas Courts. This, the Texas Courts specifically refused to do as enunciated by the opinion of the Texas Court of Criminal Appeals in stat-

ing: "nor need we pass upon the validity of Appellant's arrest as we do not have before us the search of a person incident to an arrest." This refusal to adjudicate completely ignores the doctrine of *Wong Sun v. United States*, 371 U.S. 471, that verbal or written evidence derived from an unauthorized arrest is no less the "fruit" of official illegality than a tangible product seized at the time of the illegal arrest. Thus, the "fruit" of this arrest — the written consent — was not examined by the Texas Courts in light of the "primary taint" test of *Wong Sun*. The doctrine of *Wong Sun* has been enunciated recently in *Collins v. Beto*, June 18, 1965, ...F. 2d ..... (5th Cir.) wherein it is stated:

> "Nor can the mere passage of time serve to 'dissipate the taint' of an unlawful arrest. If this were so, the police would be free to simply keep a suspect 'on ice' for a day or two before beginning an interrogation."

Under the evidence in this cause, the consent as well as the evidence seized was clearly tainted by the arrest. The wholesome doctrine of *Wong Sun* is for naught if a State Court is permitted to refuse to decide the underlying questions necessary to determine the application of *Wong Sun*. In other words, can this Court's pronouncements be circumvened by a State Court ignoring such decisions?

(b) This case represents the need for a clear application to the states under the rule of *Mapp v. Ohio*, 367 U.S. 343, and *Ker v. California*, 374 U.S. 23, to searches of a house upon the "consent" of the accused householder while he is in custody at a police station after an illegal arrest. As reflected by the opinion of the Court of Criminal Appeals, an

arrest was effected at least by the time the two postal inspectors identified themselves as such enroute to the police station. This being the case, necessarily under the Texas Code of Criminal Procedure an illegal arrest took place since the officers had no warrant of arrest for Petitioner and no misdemeanor was then being committed in the presence of the officers, authorizing an arrest for a misdemeanor, such as Petitioner was convicted of. Thus, it appears without question that under the law of Texas the arrest was necessarily illegal. Under the Federal Statutes now applicable to the states under *Mapp* and *Ker*, the finding that Petitioner consented to the search of his home from whence the incriminating evidence admitted in trial was produced was not inherently probable in light of common sense and human experience. Since consent involves a waiver of constitutional right, the Federal Courts indulge in every reasonable presumption against such a waiver. *Johnson v. Zerbst*, 304 U.S. 458. It is submitted that in this area of the law it is now commanded of the states that the Federal standards are particularly strict and, justifiably, in that when judges simply accept police testimony and become totally indifferent to that testimony that is inherently improbable, the constitutional protection is destroyed by judicial default. When consent is claimed by the state, the burden of proof is upon the state to affirmatively establish free and voluntary consent. *Pekar v. United States*, 315 F. 2d 319; *Hall v. Warden*, 315 F. 2d 483; *Badillo v. Superior Court*, 46 Cal. 2d 269; *United States v. Vilae*, 312 F. 2d 595; *Villano v. United States*, 310 F. 2d 680; *United States v. Smith*, 308 F. 2d 657,

663 (See, for excellent discussion by Judge Waterman). The consent must be given freely and voluntarily and must not be contaminated by any form of duress or coercion, actual or implied. *Amos v. United States*, 255 U.S. 313; *Channel v. United States*, 285 F. 2d 217; *Judd v. United States*, 190 F. 2d 649; *Higgins v. United States*, 209 F. 2d 819. This is particularly true when a person, such as your Petitioner, is in custody by the police, in which case the courts should search for circumstances which can be examined objectively to furnish proof that the arrestee probably consented. The burden is particularly heavy, and should be, where, as here, the accused has been arrested and has been confined in a police station at the time the written "consent" is executed. Unless the Federal standards are impressed in the premises, the wholesome effect of the principle of Federal standards will be lost through the admission of testimony of interested police officers accepted without regard to the facts and circumstances of the particular case. The judicial approach to the burden of proving consent, in contrast to the standards reflected by the Federal cases, can best be illustrated by reference to *Cameron v. Texas*, 346 S.W. 2d 845, where, while the Defendant was in jail, an officer asked the Defendant if he wanted to give him the key, or did he want him, the officer, to get a search warrant. At that point the officer received the key from the Defendant and a subsequent search of the premises was made. The Texas Courts readily sustained the search, stating that there is no rule of law which prevents the accused, while under arrest, to consent to a

search, citing *Heflin v. Texas*, 274 S.W. 2d 681. While no one could quarrel with this statement, it reflects the attitude of the Texas Appellate Court of assuming the very matter to be decided, giving the clear impression of the presumption of a waiver rather than a presumption against a waiver according to the constitutional requirements. Contrasted with the Texas attitude is that of the Federal Courts that consent is simply never "probable" where the consentor knows, as here, that the police will find the incriminating product by the search. In this instance, the product consisted of photographs, many of which, to the knowledge of the "consentor", were lying in open view upon a bed in his home; such circumstances make it highly probable that the consentor was coerced, as he so testified. As stated in *Higgins v. United States*, 209 F. 2d 819, "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."

2. Petitioner was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States by the failure of the Trial Court to make an independent finding on the issue as to whether or not Petitioner voluntarily consented to a search of his home from whence the product was found upon which his conviction was based.

The doctrine of *Jackson v. Denno*, 278 U.S. 368, is equally applicable to a determination as to whether or not consent

to search was voluntarily given as it is to whether a confession was voluntarily given. In this instance, the Petitioner was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States by the failure of the Trial Court to make an independent finding upon the issue as to whether or not Petitioner voluntarily consented to the search from which the product was found upon which his conviction was based. Your Petitioner was entitled, under the doctrine of *Jackson v. Denno*, to a determination of the underlying factual issues and voluntariness of the consent unenforced by a consideration of the product of the search — there being no way of determining under the general verdict of guilty by the jury whether the finding as to the consent was infected with impermissible considerations in violation of Petitioner's rights under the Fourteenth Amendment. Specifically, in light of the product of the search which consisted of photographs of nude men and women together, it is in fact extremely doubtful that impermissible considerations could not come into play.

3. The conviction was so lacking in evidentiary support as to constitute a violation of Petitioner's due process rights under the Fourteenth Amendment to the Constitution of the United States.

The prosecution failed to produce any evidence that according to the average man applying community standards involving a territory or geographic area, not less than the

State of Texas, the photographic material taken as a whole appealed to prurient interest. It is Petitioner's contention that in order to prove that one has violated the provisions of the Texas Statute, it is necessary to establish by evidence that the photographic material in evidence is obscene by applying the contemporary community standards of the State of Texas. While in this case, the Court properly charged the jury and instructed them relative to the provisions of Section 2, Article 527, Texas Penal Code, the jury, without any proof as to what constituted the contemporary community standards of the State of Texas, convicted Petitioner upon what the jury personally considered obscene rather than upon proof as to contemporary community standards in the State of Texas. The Court of Criminal Appeals, in its opinion curtly brushes aside this question by stating that the Petitioner's pictures "spoke" for themselves. The jury, having at no time heard any evidence as to what the contemporary community standards of the State of Texas were, the conviction rests solely upon what the jury as six individuals thought were contemporary community standards regarding obscenity in the community wherein they lived, in direct violation of constitutional and statutory standards. Inherent in the constitutional and statutory requirements is the thought that contemporary community standards are subject to change and thus a photograph can never "speak" for itself.

CONCLUSION

WHEREFORE, Petitioner prays that the judgment and verdict imposed on Petitioner in Cause No. 37,771, as affirmed

by the Court of Criminal Appeals, be set aside, vacated and held for naught; that Petitioner's Writ of Certiorari be granted and that the judgment and verdict without order of affirmance in said cause be reversed and that this Court issue said Writ to the Court of Criminal Appeals of Texas as herein prayed.

Respectfully submitted,

.....

CHARLES W. TESSMER,

.....

EMMETT COLVIN, JR.,
706 Main Street, Suite 400,
Dallas, Texas 75202,
RI 8-3433 RI 7-5893,

Counsel for Petitioner.

CERTIFICATE OF SERVICE

I, EMMETT COLVIN, JR., one of the attorneys for Ben Herbert Phelper, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of July, 1965, I served copies of the foregoing Petition for Certiorari on the several parties representing Respondent, the State of Texas, as follows:

Honorable Waggoner Carr, Attorney General for the State of Texas, Supreme Court Building, Austin, Texas;

Honorable Charles Swanner, Assistant Attorney General, State of Texas, Supreme Court Building, Austin, Texas; and

Honorable John Allison, Assistant District Attorney, Dallas County, Records Building, Dallas, Texas.

by mailing a copy in a duly addressed envelope, postage prepaid, to the above parties at the address so indicated.

.....

706 Main Street, Suite 400,
Dallas, Texas 75202.

APPENDIX A

Texas Penal Code, Article 527

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowlingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "con-

temporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Section 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Officer of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application of any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

APPENDIX B

No. 37,771

BEN HERBERT PHELPER,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Dallas County

OPINION

Appellant was convicted under Art. 527, V.A.P.C., for unlawfully and knowingly having in his possession obscene pictures, and his punishment was assessed at a fine of $1,000.

The State's evidence shows that appellant lived with his wife and step-son in the city of Richardson. In the early part of November, 1963, when the witness James Bartley was in the home delivering milk, appellant showed him some pictures of nude women. Subsequent to seeing the pictures, Bartley had a conversation with Detective Bob Smith of the Richardson Police Department. On November 7th, Detective Smith who had some experience in photography met with the appellant in a drug store, and the two became engaged in a conversation relative to photography. In the conversation, appellant told the detective that he took pictures and requested him to come to appellant's home and see his photographs so that he could recommend a place where he might sell or dis-

tribute them. The following day, Detective Smith went to the home where appellant showed him between one and two hundred pictures which were colored slides of different girls. Of the pictures exhibited only one appeared to be obscene, it being a photograph of a woman with her pubic hair exposed. On such occasion, appellant emphasized that he was interested in selling the pictures and thought the detective could use some of his contacts in helping him sell them.

After leaving appellant's home, Detective Smith had a meeting with his Chief of Police, and Postal Inspector R. H. Robinson was later called. In a meeting on November 12th with the Inspector, a buyer for appellant's photographs was set up under the name of Garrett who was to correspond with appellant relative to the pictures. On December 5th, Detective Smith returned to appellant's home, and appellant showed him some "series" pictures of the same girl in sequence of undressing. At that time appellant stated he was mailing the pictures to a man by the name of Garrett with whom he had had correspondence. On December 13th, Detective Smith again met appellant in the drug store, and appellant informed him that he was sending some more pictures to Garrett.

The State's proof further shows that on January 22nd Detective Smith again saw appellant in the drug store and introduced him to Postal Inspector Harry D. Holmes. After they had discussed going for some coffee, the three went outside to where Postal Inspector Robinson and Detective Burleson were seated in an automobile. They then got in the

car, and the five preceeded to drive to the police station. On the way to the station, Robinson and Holmes identified themselves as postal inspectors and told appellant they wanted to talk to him about the pictures. After arriving at the police station, appellant proceeded to sign and execute a written consent to the search of his home by Inspector Holmes without a search warrant. Appellant then accompanied Inspectors Robinson and Holmes and Officers Smith, Burleson and Robbins to his home where a search was made. In the search, the officers found sixteen polaroid pictures on a bed and numerous other pictures in a night stand which were photographs of men and women in the nude. Some of the pictures showed the parties engaged in the act of sexual intercourse and other unnatural sex acts.

Testifying in his own behalf, appellant stated that the reason he consented to the search of his home was because of threats of the Officers and the representations made to him that they had a search warrant. He further swore that he did not sign the written consent for the search until after the search had been completed, and they had returned to the police station. Appellant admitted possessing the photographs found by the officers in his home but stated that he took the pictures upon the encouragement and inducement of Detective Smith and a letter he had received from Garrett.

Appellant's testimony with reference to his reason for executing the written consent to search was sharply disputed by the officers as well as his claim that he was induced to take the pictures by them. Detective Smith testified that while he did have in his possession a search warrant for ap-

pellant's house he did not advise appellant of the warrant until after he had signed the written consent to search. He swore that appellant signed the consent before the search was made. He also denied having induced appellant to take and possess the photograph found as a result of the search.

The court submitted to the jury in his charge the disputed issues relative to appellant's execution of the written waiver and consent, and instructed the jury that if they believed from the evidence or if they had a reasonable doubt thereof, that appellant did not wilfully give his consent to the search prior to the time of the search, or if he signed the waiver to search as a result of threats or after he was told by the officer that they had a search warrant, to wholly disregard the pictures in question and acquit him. The defense of entrapment was also submitted under appropriate instructions.

The jury by their verdict resolved the disputed issues against the appellant.

We first overrule appellant's contention that the evidence is insufficient to support the conviction because no proof was offered by the State that the pictures introduced in evidence were obscene, which term is defined in Sec. 3 of Art. 527, supra, as whether to the average person applying community standards involving a territory or geographic area not less than the State of Texas the material taken as a whole appeals to prurient interest. When testimony was offered by the State as to what the pictures portrayed appellant objected on the ground that the pictures "spoke" for themselves. The trial court agreed with such contention and sus-

tained appellant's objection. The pictures introduced in evidence showing men and women in the nude engaged in acts of sexual intercourse are clearly obscene as that term is defined in the statute.

It is insisted that the court erred in admitting the pictures in evidence because they were obtained as the result of an illegal search. The attack upon the search is predicated upon the contention that the search warrant which the officers had obtained was invalid under the decision in Aguilar v. Texas, 12 L. Ed. 2d 723, 84 S. Ct. 1509. It is also contended that appellant's arrest by the officers was unlawful, and for this reason the search was illegal.

We need not pass upon the validity of the search warrant as the evidence shows that the officers did not search appellant's home under the authority of such warrant. Nor need we pass upon the validity of appellant's arrest as we do not have before us the search of a person incident to an arrest. The fact issues as to the validity of appellant's written consent to search his house were fairly submitted to the jury by the court. By their verdict the jury found that appellant voluntarily consented to the search. By such consent appellant waived any question as to the legality of the search. Ellithorpe v. State, 320 S.W. 2d 350; Lucas v. State, 368 S.W. 2d 605.

We find no error in the trial court's failure to make an independent finding upon the issue as to whether appellant voluntarily executed the written consent to the search. Jackson v. Denno, 84 S. Ct. 1774, relates to written confessions of an accused and is not here applicable.

Complaint is made to the court's action in permitting the State to prove the identity of the persons in the pictures which, among other things, revealed that one of the women in the photographs was the appellant's wife engaged in an act of sexual intercourse with a man by the name of James Stockwell. Objection was also made to certain jury argument of State's counsel when he stated that appellant had prostituted his own wife. Appellant's objection to the testimony showing the identity of the persons in the pictures was on the ground that it was highly inflammatory and constituted proof of extraneous offenses. In his Brief, he also insists that such testimony was in violation of Art. 714, V.A.C.C.P., which prohibits the wife from giving testimony against her husband. The identity of the persons in the pictures was clearly a part of the res gestae and admissible as such. Fite v. State, 290 S.W. 2d 897; Kerrigan v. State, 321 S.W. 2d 884; Bells v. State, 327 S.W. 2d 751. Proof of the identity of appellant's wife and Stockwell in the pictures was also admissible to rebut appellant's defense of entrapment in view of Stockwell's testimony that he had not seen appellant and his wife since the summer of 1962, and it was not until November, 1963, that Detective Smith first talked to appellant and began the investigation. Watson v. State, 301 S.W. 2d 651; Ivey v. State, 212 S.W. 2d 146.

Appellant's remaining complaints are to certain comments by the trial court which he insists were in violation of Art. 707, V.A.C.C.P.

The first comment occurred when appellant objected to the admission in evidence of certain photographs on the

ground that the affidavit for the search warrant was void and the court stated: "We are not operating on that Mr. Benavides. I think I have made that pretty clear," and during the cross-examination of appellant's wife by State's counsel with reference to the objects taken from the home when an objection was made by appellant's counsel, the court stated: "You opened it up on the hundred objects taken."

To offend against the statute, Art. 707, supra, there must be found in the court's remarks a benefit to the State or an injury to the accused. Hackett v. State, 357 S.W. 2d 391. We find neither benefit nor injury in the court's comments and overrule the contention.

The judgment is affirmed.

Dice, Judge

(Delivered March 10, 1965)

Opinion approved by the Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 407

BEN HERBERT PHELPER, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

HENRY WADE
District Attorney
Dallas County, Texas
W. JOHN ALLISON
Assistant District Attorney
Dallas County, Texas

WAGGONER CARR
Attorney General of Texas
HAWTHORNE PHILLIPS
First Assistant Attorney General
T. B. WRIGHT
Executive Assistant Attorney General
HOWARD M. FENDER
Assistant Attorney General
CHARLES B. SWANNER
Assistant Attorney General
Attorneys for Respondent
Capitol Station
Austin, Texas 78711

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED	
I.	1
II.	2
III.	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
A. Procedural History of the Case	2
B. Preliminary Statement of the Facts	3
REASONS FOR DENYING THE WRIT	
I.	7
II.	9
III.	12
CONCLUSION	13
CERTIFICATE OF SERVICE	14

LIST OF AUTHORITIES

	Page
Alberts v. California, 354 U.S. 476	12
Alexander v. State, 116 Crim. Rep. 256, 32 S.W. 2d 204	11
Beevers v. State, 151 Crim. Rep. 455, 209 S.W. 2d 175, reh. den.	11
Broyles v. State, 110 Crim. Rep 77, 7 S.W. 2d 555	11
Collins v. Beto, June 18, 1965, —F. 2d —	7
Compton v. State, 148 Crim. Rep. 204, 186 S.W. 2d 74	11
Corley v. State, 150 Crim. Rep. 107, 199 S.W. 2d 782	11
Frazier v. State, 119 Crim Rep. 217, 43 S.W. 2d 597	11
Jackson v. Denno, 278 U.S. 368	9, 10, 11
Ker v. California, 374 U.S. 23	9
Mapp v. Ohio, 367 U.S. 343	9
Roth v. U.S., 354 U.S. 476	12
Scott v. State, 139 Crim. Rep. 210, 139 S.W. 2d 787	11
White v. State, 119 Crim. Rep. 338, 45 S.W. 2d 225	11
Wong Sun v. United States, 371 U.S. 471	7, 8
CONSTITUTIONS	
United States	
Fourteenth Amendment	1, 2, 7, 9, 12
STATUTES	
United States	
28 United States Code, Section 1257(3)	1
Texas	
Article 527, Texas Penal Code	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 407

BEN HERBERT PHELPER, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The State of Texas files this its response to the Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas in this cause.

JURISDICTION

Petitioner invokes the jurisdiction of this Court on the basis of 28 U.S.C., Section 1257(3). Respondent asserts that no substantial federal question is presented herein for review.

QUESTIONS PRESENTED

I.

Whether or not Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the fruits of

the search based upon a written consent to search executed by Petitioner.

(a) Was Petitioner entitled to have the question of his consent to search considered by the Texas Courts in light of his assertion of involuntariness?

(b) Did the State of Texas sustain the burden of proving that the written consent to search Petitioner's home was free and voluntary?

II.

Whether or not under the Fourteenth Amendment to the Constitution of the United States, the trial court was required to make an independent finding on the issue as to whether or not Petitioner voluntarily consented to the search of his home; and if so, whether such an independent finding was in fact made.

III.

Whether or not the conviction was so lacking in evidentiary support as to constitute a violation of Petitioner's due process rights under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This is printed in Appendix B of Petitioner's Writ of Certiorari.

STATEMENT OF THE FACTS

A. Procedural History of the Case

Petitioner was convicted under Article 527, Texas Penal Code, for unlawfully and knowingly having in his possession obscene pictures, his punishment being

assessed after a trial by jury at a fine of $1,000. His conviction was affirmed by the Court of Criminal Appeals of Texas, the court of last resort in Texas having jurisdiction over criminal matters. Petitioner has duly and timely filed his Petition in this Court seeking a review of such conviction.

B. Preliminary Statement of the Facts

(As has been pointed out by counsel, a distinction is made in Texas practice between the Statement of Facts, which denotes trial testimony, and the Transcript, which includes the papers filed with the clerk of the court. All references hereafter to the Statement of Facts will be denominated S.F., and to the Transcript, Tr.) The evidence introduced by the State and found by the jury, rather briefly summarized, is as follows:

On November 7, 1963, Officer Robert C. Smith of the Richardson, Texas, Police Department was introduced by a Martin Howard to the Petitioner, Ben Phelper. This introduction and meeting took place in Richardson in the Sun Drugstore, where Howard was employed as a clerk (S.F. 9-10). Smith had received a complaint concerning Phelper, and the two "struck up" a conversation there in the drugstore. Phelper, at the time, was reading a Playboy magazine, and the conversation turned to the subject of photography. Phelper invited Smith to his home to view some of Phelper's photographs with a view towards an outlet for sale or distribution of them (S.F. 10-11). Prior to this time, Phelper had known that Smith was employed as a police officer by the Richardson Police Department, and this fact entered into the conversation (S.F. 11-12). The next day, November 8, was Smith's first opportunity to visit Phelper in his home, and he called

Phelper to confirm the invitation and ask if it would be all right if he brought his partner, Lieutenant Robbins, with him. Phelper's phone number was unlisted and he had given him the number the day before. While visiting there in Phelper's home, Smith and Robbins discussed the subject of photography for approximately an hour, after which the three went into Phelper's study where they were shown approximately one hundred to two hundred slides of various girls. One of the slides which they viewed showed a woman with her pubic hair exposed (S.F. 14-16), which was considered obscene by Smith (S.F. 137).

On December 5, 1963, Smith again visited Phelper's home for the purpose of looking at more pictures before they were to be sent to "Mr. Garrett," the pseudonym of a Federal Postal Inspector to whom Phelper had been mailing such pictures. Smith was dropped off at the Phelper home by Sergeant Lawrence of the Richardson Police Department; and during the visit, Smith was shown series pictures of girls, i.e., several shots of the same girl in sequence of undressing. Some of these pictures were different from the ones that had previously been exhibited to him (S.F. 17-18).

Reverting to the events transpiring between November 7 and December 5, Smith, as a result of the first meeting, called Postal Inspector R. H. Robinson to "establish a buyer" for the pictures; whereupon Postal Inspector Robinson set up a name, Gilbert Garrett, of Rockwall, Texas, to correspond with Ben Phelper in regard to the sale of pictures (S.F. 19-20).

The second meeting, that of December 5, lasted approximately three hours; and during that time, Smith, together with Officer Lawrence, was shown some more

pictures (S.F. 21-24), three or four of which were obscene (S.F. 139).

Prior to January 22, the date of the events complained of by Petitioner, Smith saw Phelper on two or three more occasions, at one of which there was a further discussion of Phelper's sending Gilbert Garrett more pictures (S.F. 24-25).

On January 22, Detective Smith, Postal Inspector Harry D. Holmes, Postal Inspector Robinson and Richardson Police Detective Burleson all went in an automobile to the Sun Drugstore in Richardson where they encountered Phelper. As Smith and Holmes were leaving the drugstore, they began chatting with the Petitioner, and as they left, he asked them where they were going. They said they were going to have some coffee, and he followed them to the front of the drugstore, whereupon Holmes asked him if he would like to have some coffee with them. Phelper replied that he would and he followed them into the car (S.F. 42). As he got into the car, the two postal inspectors identified themselves to Phelper as being postal inspectors (S.F. 26-28). They all drove to the police department and proceeded into an office where they had coffee for about ten minutes, whereupon Holmes displayed to Phelper the pictures that had been sent by Phelper through the mail to him (S.F. 28-29). Postal Inspector Holmes then informed Phelper that he had been under investigation, explained to him that he was a federal officer, and warned him of his rights under the Federal Rules of Criminal Procedure (S.F. 30, 188, 222, 313-314, 369-370, 353). This warning consisted of a statement that Phelper was not required to make any statement whatever, but that any statement he made could be used in evidence against him, and that he was en-

titled to assistance of counsel at this stage. (During the testimony at this stage of the trial, the jury was retired.)

Phelper had been to the police station on a previous occasion for coffee (S.F. 36).

During this time, and until the questioned permission to search was signed and the search had been completed, Phelper was not under arrest (S.F. 37, 39, 76, 150). On several occasions he considered leaving during this time, but decided not to (S.F. 88). Prior to the time the officers began discussing with Phelper the details of the pictures, there was a conversation of indeterminate length between Holmes and Phelper about their war experiences (S.F. 37-38). These events all occurred between 4:30 and 5:30 p.m. of January 22, 1964. At approximately 5:30 on that day, Postal Inspectors Holmes and Robinson began discussing with Phelper the matter that had been mailed to Robinson through the mail by Phelper, and Robinson informed Phelper that he desired to search his house. Phelper, in reply, was quite agreeable and said words to the effect of "Well, you've got the goods on me. Come on down and see the rest of it." Thereupon, he proceeded to sign the permission to search, reproduced as State's Exhibit 3 (Exhibit S.F. 3). The waiver was signed long prior to the time of the search (S.F. 93-95). The officers and Phelper then left the Police Department and proceeded to Phelper's home. The five entered the house, Phelper first, and met Phelper's wife, Louise Phelper, coming out of the kitchen. Phelper requested that he be allowed to discuss this with his wife in order to calm her down and went with her and had a private conversation with her in the kitchen which lasted from fifteen to forty-five minutes (S.F. 75, 78, 191, 226-227).

The kitchen had a back door opening to the outdoors (S.F. 389). After the private talk with his wife, the Petitioner returned to the living room and told the officers to "go ahead" (S.F. 75).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WERE NOT VIOLATED BY THE ADMISSION OF THE OBSCENE PHOTOGRAPHS OBTAINED AS A RESULT OF THE SEARCH BASED UPON PETITIONER'S WRITTEN PERMISSION TO CONDUCT SUCH SEARCH.

A. Petitioner argues that the purported illegality of his arrest should have been examined and determined by the Texas Courts in light of this Court's opinion in *Wong Sun v. United States,* 371 U.S. 471, and the holding of the United States Court of Appeals for the Fifth Circuit in *Collins v. Beto,* June 18, 1965, — F.2d —. *Wong Sun,* of course, was a federal prosecution; and quite apart from the question of its applicability to State prosecutions (which is unclear), it is Respondent's position herein that, upon the facts of the case, even if the arrest were "tainted," the events preceding and subsequent to the execution of the permission to search dissipated any such taint.

However, the evidence shows that Petitioner was not, in fact, arrested by the State or Federal officers until after the search had been completed, many hours after the execution of his permission to search. Petitioner himself testified that he had considered on sev-

eral occasions leaving the police station, but had decided not to. This is a strong indication that, both subjectively and objectively, Petitioner was not, at the time of the execution of the waiver, under arrest.

Even so, as in *Wong Sun,* the Court after examining the relevant facts, must necessarily conclude that, had the arrest been a "tainted one," the events surrounding the incident would serve to vitiate any such taint. These facts and circumstances, in contrast to the facts surrounding the arrest, search and confession of Petitioner Toy in *Wong Sun* are as follows:

1. The officers, both Federal and State, had received reliable information that Phelper was in possession of large numbers of obscene photographs, and that these were located in his home. This information was obtained as a result of the view of certain of these photographs by Officer Smith and the mailing of same to the Postal Inspectors by Phelper.

2. Based upon such reliable information, the officers, both State and Federal, could have obtained, upon ample reasonable basis and probable cause, both warrants of arrest and search for Phelper.

3. There was never any misrepresentation by any of the officers as to their identity as such. Phelper knew at all times that Officer Smith was a Richardson, Texas, Police Detective and that Robinson and Holmes were Federal Postal Inspectors.

4. Before executing the consent complained of, Phelper was given the standard federal warning by the Postal Inspectors.

5. No force was ever used on Phelper to induce him to come to the police station with the officers. The evidence (S.F. 42) shows that the trip to the police

station was made at Phelper's request. He was never hand-cuffed nor otherwise restrained.

6. After the consent was executed and the officers had accompanied Phelper to his home, Phelper had a lengthy, private conversation with his wife.

7. After such conversation, Phelper gave oral permission to the officers to go ahead and conduct the search.

The Court of Criminal Appeals, in giving effect to the permission to search, no doubt considered each of these factors in arriving at its conclusion. In view of this, Respondent strongly urges that each of these factors, and all of them taken together, would effectively serve to vitiate any purported taint arising from the events at the police station.

B. Since the permission to search was relied upon by the State as evidence of its right to search, the cases of *Mapp v. Ohio,* 367 U.S. 343 and *Ker v. California,* 374 U.S. 23, have no application here. Petitioner's question as to whether the state sustained its burden of showing that the permission was executed voluntarily is amply answered by the Statement of Facts supported by references to the record above.

II.

PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE STATE'S MANNER OF PROOF OF PETITIONER'S VOLUNTARY CONSENT TO THE SEARCH OF HIS HOME.

Petitioner seeks to extend the doctrine of *Jackson*

v. Denno, 278 U.S. 368, from the field of confessions to the facts of the present case, i.e., voluntary consents to search. Such an extension is wholly unwarranted and unsupported by the Court's opinion in *Jackson* and should not be made.

Even so, the actions of the court demonstrate conclusively that all of the safeguards erected by this Court in the area of confessions were effectively granted to Petitioner in this case by the actions of the trial court. On page 31 of the Statement of Facts, during the testimony of Officer Smith, upon motion of defendant, the jury was retired in order that the Court might hear evidence "for the purpose of determining the validity of any process by which this man's house was searched." Following this and out of the presence of the jury, Smith testified as to the facts surrounding the execution of the consent as did Phelper, his wife and Inspector Robinson. During this time, the facts relating to the execution of the consent were fully inquired into by all parties. Subsequent thereto, as is reflected by the opinion of the Court below, when petitioner had objected to the admission in evidence of the photographs on the ground that the affidavit for the search warrant was void, the Court stated "We are not operating on that, Mr. Benavides. I think I have made that pretty clear," thus indicating that the Court had made whatever independent finding may be considered necessary by Petitioner and had allowed the introduction of the obscene photographs on the basis of the written permission to search. The Court, on numerous other occasions during the trial, in response to Petitioner's objections, ruled in favor of their admissibility (S.F. 110, 114, 123, 128, 193, 197, 202, 257). Indeed, since in Texas the question of the validity of a search is one of law for the court to decide

initially, *Broyles v. State,* 110 Crim. Rep. 77, 7 S.W. 2d 555; *Alexander v. State,* 116 Crim. Rep. 256, 32 S.W. 2d 204; *White v. State,* 119 Crim. Rep. 338, 45 S.W. 2d 225; *Corley v. State,* 150 Crim. Rep. 107, 199 S.W. 2d 782; *Beevers v. State,* 151 Crim. Rep. 455, 209 S.W. 2d 175, reh. den., and the burden of proof thereon rests upon the prosecution, *Frazier v. State,* 119 Crim. Rep. 217, 43 S.W. 2d 597; *Scott v. State,* 139 Crim. Rep. 210, 139 S.W. 2d 787; *Compton v. State,* 148 Crim. Rep. 204, 186 S.W. 2d 74, the trial judge must of necessity have determined in his own mind not only that the consent was voluntary but that it was so beyond reasonable doubt. Thereafter, following the inquiry into the facts of the execution of the consent in the absence of the jury and the Court's determination of its voluntariness, the Court then submitted an appropriate instruction to the jury relative to the execution of the waiver and consent that if they believed from the evidence or if they had a reasonable doubt thereof, that Phelper did not willfully give his consent to the search prior to the time of the search, or if he signed such waiver as a result of threats or after he was told by the officers that they had a search warrant, that they must wholly disregard the pictures in question and render a verdict of acquittal. Thus, even should the doctrine in *Jackson* be extended to cover the facts in this case, it is abundantly clear that all of the safeguards therein required were amply met by the actions of the trial court.

Further, Petitioner seeks to convince this Court that "in light of the product of the search which consisted of photographs of nude men and women together, it is in fact extremely doubtful that impermissible considerations could not come into play." No evi-

dence is offered by Petitioner on this assertion, but it is Respondent's position, that in view of the very light penalty assessed, consisting of only a fine without imprisonment, it should be plain that no impermissible considerations did in fact come into play.

III.

THE CONVICTION WAS NOT LACKING IN ANY PARTICULAR IN EVIDENTIARY SUPPORT SO AS TO CONSTITUTE A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

By this point, Petitioner seeks to complain that there was no evidence introduced in the trial that the photographs in question were in fact obscene, presumably relying upon the Court's definition of such in *Roth v. U.S.,* 354 U.S. 476, and *Alberts v. California,* 354 U.S. 476. The Court below considered this contention and rejected same noting that when testimony was offered by the State as to what the pictures portrayed, Petitioner objected on the grounds that the pictures spoke for themselves. We agree. On at least four occasions, the State sought to introduce evidence that various of the pictures were obscene (S.F. 193-194, 203, 389, 16). In addition, Officer Smith (S.F. 18) did testify that one of the pictures was obscene. The originals of the photographs have been forwarded to the Court for its inspection, and without going into unnecessary detail on such photographs, Respondent will merely state its position that such pictures showing men and women in the nude engaged in acts of sexual intercourse and other lewd acts are clearly obscene as that term has been defined by this Court.

CONCLUSION

Wherefore, Respondent prays that the judgment of the Court of Criminal Appeals of Texas, in Cause No. 37,771, be affirmed and that Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

HENRY WADE
District Attorney
Dallas County, Texas

W. JOHN ALLISON
Assistant District Attorney
Dallas County, Texas

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

CHARLES B. SWANNER
Assistant Attorney General

By: Howard M. Fender
Assistant Attorney General

Attorneys for Respondent
Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Howard M. Fenner, Assistant Attorney General of Texas, Attorney for Respondent, certify that a copy of the above and foregoing Response to Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas has been served on Petitioner by mailing same to the following address: Charles W. Tessmer, Emmett Colvin, Jr., Attorneys at Law, 706 Main Street, Suite 400, Dallas, Texas, 75202, Attorneys for Petitioner, this the 19 day of November, 1965.

Howard M. Fenner

Assistant Attorney General